

June 4, 2012

David M. Fleishman  
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Hanley & Fleishman, LLP  
8930 Morro Road  
Atascadero, CA 93422

Re: Your Request for Advice  
**Our File No. A-12-079**

Dear Mr. Fleishman:

This letter responds to your request for advice on behalf of City of Guadalupe Mayor Lupe Alvarez regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws. Also, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

### QUESTION

Does Mayor Alvarez have a disqualifying conflict of interest that precludes him from participating in governmental decisions concerning various telecommunications-related easements and leases with regard to the City’s elevated water tank?

### CONCLUSION

No. Mayor Alvarez may participate in the decisions concerning the subject easements and leases absent additional facts demonstrating that the decisions will have any reasonably foreseeable financial effect on his real property.

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<sup>1</sup> The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## **FACTS**

In an upcoming meeting, the Guadalupe City Council plans to consider certain actions related to the City's elevated water tank. Specifically, it will make decisions concerning easements and leases for telecommunications purposes. By e-mail dated May 31, 2012, you explained that the water tank is a prime location to place antennas because it is the tallest structure for many miles around in a generally flat area. The City currently has five leases with various cellular telephone companies to place their antennas on the tank.

At the next meeting, the council will decide whether to grant a cellular aggregator various easements/leases on the City's water tank. In effect, the aggregator would take over the day-to-day management of the current leases and receive a portion of the revenue generated by them. The aggregator would also lease approximately 250 square feet of property under the water tank where they would place what is commonly referred to as a "shed" to house additional communications equipment for new cell carriers. Presently, there are already several sheds in the area directly underneath the water tank where existing cell carriers house their equipment.

Mayor Alvarez has an ownership interest in a residential triplex that is located within 500 feet of the subject water tank. It is your understanding that the property is held in a family trust, and that Mayor Alvarez has a ten percent ownership interest in it.

Mayor Alvarez has not participated in past decisions regarding the easements and leases on the water tank on the basis of the 500-foot rule under the Act. However, he now expresses doubt as to whether his participation in the upcoming decisions on this matter will constitute a prohibited conflict because he believes there will be no foreseeable financial impact on his economic interest resulting from the participation in the decision.

## **ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

**Steps One and Two: Is Mayor Alvarez a “public official” who will be making, participating in making, or influencing a governmental decision?**

The conflict-of-interest provisions of the Act apply only to “public officials.” (Section 87100.) Section 82048 defines “public official” as every member, officer, employee, or consultant of a state or local government agency. Regulation 18701 provides:

“(a) For purposes of Government Code section 82048, which defines ‘public official,’ and Government Code section 82019, which defines ‘designated employee,’ the following definitions apply:  
“(1) ‘Member’ shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority.”

As the Mayor of the City of Guadalupe, Mayor Alvarez is a public official. In addition, you stated that the Guadalupe City Council will be asked to make decisions concerning various telecommunications-related easements and leases with respect to the City’s elevated water tank. Thus, Mayor Alvarez will “make a governmental decision” if he votes on the matters related to the City’s elevated water tank. (Regulations 18702 - 18702.3.)

**Step Three: What are Mayor Alvarez's economic interests?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests of a public official as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (section 87103(a); regulation 18703.1(a)) or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- A public official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$360 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

(Section 87103; Regulations 18703-18703.5.)

Under Section 82033, an “interest in real property” is defined to include “a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, or indirectly or beneficially, a 10-percent interest or greater.” Because Mayor Alvarez has a 10-percent interest in the family trust, he has an economic interest in his pro rata share of real property owned by the trust, including the residential triplex that is located within 500 feet of the elevated water tank. Assuming this pro rata interest is worth \$2,000 or more, the real property would be an economic interest.<sup>2</sup> (Section 87103(b).)

**Step Four: Will Mayor Alvarez’s economic interests be directly or indirectly involved in decisions he will make, participate in making or influence as a public official?**

Real property in which a public official has an economic interest is directly involved in a governmental decision if it is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

According to the facts provided, Mayor Alvarez possesses an ownership interest a residential triplex, which is located within 500 feet of the City’s elevated water tank. Accordingly, Mayor Alvarez’s economic interest in the real property will be *directly* involved in governmental decisions involving the water tank.

**Step Five: What is the applicable materiality standard?**

Regulation 18705.2(a)(1) provides the materiality standard for *directly* involved real property as follows:

“The financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property.” (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is commonly referred to as the “one penny rule.” In order to rebut this

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<sup>2</sup> Assuming the property is used as a rental business, it is possible that Mayor Alvarez also has an economic interest in the triplex both as a business entity and source of income, as well as an economic interest in the tenants as a source of income. However, no facts concerning the amount of income Mayor Alvarez receives from the rental property or any particular tenant were provided. Accordingly, the remaining analysis will not consider those potential economic interests.

presumption, it is necessary to establish that the decision would not even affect the property's value by one cent.

**Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision on Mayor Alvarez's economic interests will meet the applicable materiality standard?**

Once a public official has determined the materiality standards applicable to each of his or her economic interests, the next step is determining whether it is "reasonably foreseeable" that the standard will be met. A material financial effect on an economic interest is "reasonably foreseeable" if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered "reasonably foreseeable," but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances surrounding each case. (*In re Thorner*, supra, at 198.) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Given the facts presented in this matter, however, it is difficult to imagine how it would be reasonably foreseeable that a decision to transfer the day-to-day management of current telecommunications leases and permit additional telecommunications sheds under the water tank would have any financial effect on the value of Mayor Alvarez's triplex located within 500 feet of the tank. Accordingly, absent additional facts demonstrating that the governmental decision will have any reasonably foreseeable financial effect on his triplex, Mayor Alvarez may participate in the upcoming decisions without any potential conflict of interest.

**Steps Seven and Eight: Public Generally and Legally Required Participation**

You have not given any facts indicating that the "public generally" exception may apply, or to indicate the "legally required participation" exception would be necessary.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Jack Woodside  
Senior Counsel, Legal Division

JW:jgl